Supreme Court, U.S.
FILED

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No. 04-857 SEP 10 2004

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In The

Supreme Court of the United States

Gjelosh Joseph Rukaj,

PETITIONER,

V.

Brian Fischer, Superintendent Sing Sing Correctional Facility,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gjelosh Joseph Rukaj
Petitioner Pro Se
98A3155
Sing Sing Correctional Facility
354 Hunter Street
Ossining New York 10562

QUESTION PRESENTED

WHETHER THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICAL PROCEEDINGS, AND APPLIED THE WRONG STANDARD TO PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, THAT WAS CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW, AS ESTABLISHED BY THE UNITED STATES SUPREME COURT, WHICH RESULTED IN A DECISION THAT CONFLICTS WITH DECISIONS OF OTHER STATE COURTS, AND INVOLVES AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AND RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN STATE COURT PROCEEDINGS, U.S. CONST. AMEND. VI; U.S. CONST. AMEND. XIV .

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PEITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeal appears at Appendix _____ to the petition and is

[ ] reported at _____ ; or,
[ ] has been designated from publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at **Appendix A** to the petition and is

[X] reported at ___ **F.Supp.3d ___, (SDNY February 27, 2003)**; or,
[ ] has been designated from publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at **Appendix B** to the petition and is

[X] reported at **266 A.D.2d 407 (App. Div. 2d Dept.**); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix ____ to petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was **January 14, 2004**.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Courts of Appeals on the Following date: **June 24, 2004**, and a

copy of the order denying rehearing appease at **Appendix C** .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A _____ .

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1)

[ ] For cases from **state courts**:

The date which the highest state court decided my case was _____ . A copy of that decision appears at Appendix _____ .

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____ .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI & XIV

Petitioner was denied his right to assistance of counsel and effective assistance of counsel; Petitioner was deprived of his right to equal protections of the law.

28 U.S.C. § 2254 (1994 & Supp. 1998)

STATEMENT OF THE CASE

Petitioner was convicted in the New York State Supreme Court, Westchester County, after a jury trial on June 3, 1998, before the Honorable Kenneth H. Lange of the Crimes of murder in the second degree and criminal possession of weapon in the second degree. He was sentenced to 20 years to life imprisonment for the murder conviction and 2 ¼ to 4 ½ years for each of the two weapons counts.

On appeal to the Appellate Division, Second Department, that court affirmed petitioners conviction in a summary order. People v. Rukaj, 698 N.Y.S.2d 167, 266 A.D.2d 407 (November 15, 1999). The Honorable George Bundy Smith, denied his application for leave to appeal to the Court of Appeals on December 31, 1999. People v. Rukaj, 94 N.Y.2d 866.

Petitioner then submitted an application to the trial court to vacate his conviction pursuant to New York Criminal Procedure Law section 440.10. That application was denied on February 27, 2001, by the Honorable Kenneth Lange. People v. Rukaj, 704 N.Y.S.2d 542. The court then denied petitioner's application for permission to appeal the denial of Judge Lange's decision and order to the Appellate Division, Second Department on May 18,

2001. Petitioners application for a writ of coram nobis based on the issue of ineffective assistance of appellate counsel was denied by the Appellate Division, Second Department on March 4, 2002. People v. Rukaj, 738 N.Y.S.2d 602, 292 A.D.2d 400.

Having fully exhausted all of his state remedies, petitioner submitted a petition for a writ of habeas corpus to the United States District Court for the Southern District of New York. The Honorable John S. Martin, United States District Judge, denied the petition. Judge Martin's decision, however, failed to address the specific facts of petitioner's case and mis-characterized the facts and for all practical purposes rubber stamped the State's position. Judge Martin also disregarded established Supreme Court precedent supporting the counsel clause herein – which precedents clearly elevate the issue to one of constitutional dimension. Rukaj v. Fischer, ___ F.Supp.3d ___ (S.D.N.Y. February 27, 2003).

In this case, Petitioner paid a huge fee to have a prestigious attorney, Jay Goldberg, to defend him at trial on *capital murder* charges.[1] Once retained, petitioner had

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[1] This retainer agreement provided that Mr. Goldberg would represent petitioner through verdict – either a guilty or a not guilty finding – for the fee of $325,000. Hence, if a mistrial were to be declared at the end of this lengthy trial, Mr. Goldberg

every right to expect the undivided loyalty of his attorney. Mr. Goldberg, however, abandoned that role!

Prior to summations, issues arose concerning the jury's ability to reach a verdict in this case. On March 10, 1998, the trial court learned through its clerk that the jurors had expressed fears for their safety should they arrive at a verdict that displeased either side.

As a result of their expressed concerns for their safety, the court through its clerk had detailed ex parte communications with the jury in an attempt to ameliorate their fears.[2] Their fears, however, were not abated.

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would have been obliged to represent petitioner at the second trial for no additional charge. Hence, it clearly would not have been in Mr. Goldberg's "*financial interest*" to have the court declare a mistrial.

[2] Indeed, throughout the trial, the courtroom had the coercive atmosphere of an armed camp. One side of the large courtroom was filled with members of the victims family – all dressed from head to toe in black. Courtroom spectators aligned with the victims family repeatedly attempted to intimidate counsel for the defense as well as members of the Petitioner's family, and by indirection, the jury. On several occasions, the trial court issued stern warnings regarding such behavior, threatening to remove spectators from the courtroom and/or hold certain individuals in contempt of court. On at least two occasions during the trial, as defense counsel noted, individuals approached jurors and made pejorative comments about Petitioner. On both occasions, because of the extremely prejudicial nature of the comments, the jurors had to be replaced with alternate jurors. On other occasions, defense counsel was confronted and physically touched by members of the victim's

Defense counsel discovered these ex parte communications had taken place only after the fact, when a court officer, in the confidence that their identity would not be revealed, informed the defense attorney of what had been going on with the jurors.

Two days later, on March 12th the court advised the defense that they could voir dire the jurors and ask them individually what their concerns were and whether they would be willing to continue as jurors in this case. *With respect to this option, the court expressed its opinion that if the jurors were given any opportunity to say how they felt, that some of them would ask to be removed from the jury*. Because there was only one alternate juror remaining, the court did not believe that they would have the requisite 12 jurors and it would be compelled to declare a mistrial.

Another option, according to the court, would be for it to speak on the record to all the jurors, indicating that the court was a aware of their concerns, and that it was satisfied that whatever was necessary for the integrity of the jury process would be done while at the same time

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family. The court also took action after a factual hearing to protect Petitioners teenage daughter after the victims sister engaged in threatening behavior. Obviously, this pervasively threatening and intimidating atmosphere created by the "spectators" was not lost on the members of the jury.

reminding them of the oath that they took and rendering the instructions for them to decide the case without fear, favor, bias or prejudice. The court acknowledge that is had not discussed this matter with any of the attorneys until that morning (March 12th) as the court was hoping, that the Court officers would explain to the attorneys what security provisions would be undertaken. The court next told petitioner that although his attorneys preferred to have this jury decide the case, it would give him time to discuss this matter with his attorneys. Mr. Goldberg then stated that the court had proceeded in good faith and though it was his belief that the defendant could insist on a mistrial (which by law would have to be granted), he did not believe that this was in the defendant's interest. However, Mr. Goldberg stated that he did not want the record to indicate that he was influencing the defendant in any way. Mr. Goldberg stated, "I want the defendant to have a full and fair opportunity to weigh his option, and then to make a knowing and voluntary waiver of his right to insist upon making an application for a mistrial decided upon by the judge, and I do not want there to be rush to a determination."

Mr. Goldberg further stated, "Certainly he's (petitioners) not responsible for any of this, and I must say,

neither myself, Mr. Santangelo or Mr. Linder have spoken to him (petitioner) about this, and he knew nothing of this, and I would ask that he be given a fair and reasonable time to make what he has to be a super momentous decision. An error on his part could result in a life sentence without parole, and it's just something too weighty for me to make, for me to recommend. It has to be his complete decision, and I would ask that he be given an opportunity to think about this." As Mr. Goldberg properly noted, "this kind of a decision is as heavy a decision as any defendant in my experience would be caused to make."

At that point, the court gave Petitioner that opportunity to discuss this issue with his attorneys. Subsequently (after only five minutes of discussion), *Mr. Goldberg told the court that the defendant was willing to go forward only if the court would issue an order of sequestration now as they could no longer risk further intimidation of the jury.*

It was next proposed that counsel give their summations on the following Monday and that the jury would then be sequestered. Still not relinquishing his condition for immediate sequestration of the jury, petitioner asked for more time to consider this matter and, he indicated that he had real concerns regarding the fact

that this jury appeared to be fearful for their safety. Whereupon, the case was adjourned for the following Monday (without sequestering the jury).

On March 16th (the next Monday), in petitioner's presence, his counsel told the court that immediately after Thursday's appearance, he had received a call from Petitioner, who insisted that he tell the court that he was requesting a mistrial because of the concerns that arose with respect to the contamination of the jury especially given that court's concern that if the jury were to be voir dired concerning their fears, the jurors would opt out of the trial, thereby requiring a mistrial. Notably, nothing at all took place between the time of petitioners last court appearance when he agreed to forego a mistrial (only if the jury was sequestered – which did not occur) and his application for the mistrial. Nonetheless, the court denied this application, stating that petitioner had already waived his right to request the mistrial.

> At that point, Mr. Goldberg told the court: "Judge Lange, will you note that my letter (i.e., the fax) to you is withdrawn in favor of the defendant's position. The defendant guides his own destiny (which was not what he stated in his fax), and I don't want any Appellate Court thinking that I in any way took the position contrary to the defendant's request for a mistrial (which

he obviously did). The defendant feels it's in his interest to have a mistrial. He is the captain of his own ship." (All sentiments at odds with his clandestine fax.).

The court responded, *"I have not put the correspondence that I got by fax from Mr. Goldberg, the fax I received after that from Mr. Santangelo, into the record. If anybody wants them marked, I'll have them marked. I'm assuming everybody is standing by their positions that were on the record both on Thursday and this morning."* [3]

Left to fear for their own physical safety, the jury thereafter rendered what was clearly a compromise verdict – one that was designed to appease both the complainants' family and the defendant.

The petitioner learned for the first time several months after his conviction that his trial counsel (Jay Goldberg) secretly betrayed him in furtherance of his own selfish interest by taking a position with the court and the prosecutor that was contrary to his own.[4]

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[3] It is thus clear that this fax was not made a part of the record in this case. It is further obvious that no attempt was made to apprise petitioner of the content of this fax or to read him the fax that his attorney secretly sent the court and prosecutor.

[4] This case presents a prime example of the procedural games played out in the state courts and the federal courts as well that Petitioner believes undermines the integrity of the

Although Petitioner insisted that he wanted a mistrial because of the ex parte communications that the clerk had with the jurors and the jurors fears and concerns about their safety, unbeknownst to him, Mr. Goldberg in a hand-written fax to the court and prosecutor told the court that the defendant's desire to seek a mistrial was against his advise and that he would not represent a client who went against his advise. Accordingly, Mr. Goldberg demanded permission to be relieved from this case if a mistrial were granted. Mr. Goldberg never sent his own client a copy of this most destructive missive; he never communicated to Petitioner that he was publicly taking a stand that was adverse to his client's direct wishes in a capital murder trial; and he still remained silent about his complicity in this matter when appellant's plea for a mistrial was finally heard and denied by the court (but only

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judicial system. Here, the State stated that Petitioner was procedurally barred from raising this issue because he did not raise is on his direct appeal. Petitioner could not raise this issue on direct appeal because, he only learned about the fax several month after his conviction. Further, all the parties buried this issue in an effort to conceal the fax from him when the fax was not made part of the record. Petitioner set out all these facts before Judge Martin. Why the judge adopted the stance that this issue was procedurally barred is troubling to say the least. Were the record is so clear, as here, The Supreme Court should call it as it really is and stop these foul tactics by the State.

after reading Mr. Goldberg's secret communication) – facts again ignored by Judge Martin.

What is far worse, all of Mr. Goldberg's on the record sentiments in support of Petitioner's position were patently contradicted by his secret missive to the Court. His conduct was no less than duplicitous. Equally disturbing, although an oblique reference was made to this letter by the court, neither the court, his counsel, or the prosecutor ever showed Petitioner a copy of this letter or asked if he had seen it (further vital facts ignored by the court below). Thus at a critical moment of this trial, when the jury was about to engage in its deliberations, Petitioner was never informed that his trusted counsel had turned against him and acted without his knowledge and consent in taking a position that was totally adverse to his wishes.

Thus, petitioner was stripped of his Sixth Amendment right to counsel as guaranteed by the Constitution and his right to have an attorney, who considered his client's interests above his own. He was also denied his fundamental Fourteenth Amendment right to due process when the State concealed his attorney's betrayal from him.

Given these facts, the issue raised herein all merit the granting of a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The petitioner's writ of habeas corpus, pursuant to 28 U.S.C. § 2254, was governed by the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254 (1994 & Supp. 1998), which limited the authority of Federal Courts to grant writs of habeas corpus to state court prisoners unless (1) the adjudication of a claim on the merits in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254 (d) (1), or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings." 28 U.S.C. § 2254 (d) (2)[5]

This Court, in Williams v. Taylor, 529 U.S. 362, 404-05 (2002), indicated that the "contrary to" and "unreasonable application" clauses of section 2254 (d) (1) have independent meanings. A State courts decision will be determined to be "contrary to" clearly established

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[5] The petitioners writ of habeas corpus is governed by AEDPA because the petition was filed on May 8, 2002, after the effective date of the Act. See Williams v. Taylor, 529 U.S. 362, 402 (2000); see also Overton v. Newton, 295 F.3d 270 (2d Cir. 2002).

Federal Law where the state court "applies a rule that contradicts the governed law set fourth in [Supreme Court] cases, or if the state court "confronts a set of fact that are materially indistinguishable" from those considered by the Supreme Court, but nevertheless reaches a decision contrary to the Court's clearly established precedent. Id. at 405-06; accord Jones v. Stinson, 229 F.3d 112, 119 (2d Cir. 2000). Under the "unreasonable application" prong of section 2254 (d) (1) a state court decision will be set aside if it unreasonably applies the correct governing legal rule to the particular facts of the case. William v. Taylor, 529 U.S. at 407, 409; accord Overton v. Newton, 295 F.3d at 275.

In examining the District Court's application of federal law, in Petitioner's case the appropriate inquiry is whether the decision was objectively unreasonable, and departed from the accepted and usual course of judicial proceedings. Williams v. Taylor, 529 U.S. 410. However, while "[s]ome increment of incorrectness beyond error is required[,] ... [that] increment need not be great; otherwise habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." Francis S. v. Stone, 221 F..3d 100, 111 (2d Cir. 2000) (internal quotation omitted). In pursuing this analysis, the

state court's determinations of factual issues are presumed to be correct, 28 U.S.C.§ 2254 (e) (1).

However, this Court will discover after reviewing the decision of the Honorable John S. Martin, United States District Judge, was improper, resulting in the unreasonable application of clearly established Federal law that is contrary to this Court's precedent, and conflicts with the decisions of other state courts.

The Counsel Clauses of the Sixth Amendment provides that a criminal defendant "shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Cont. Amend. VI. This right to counsel is "the right to *effective* assistance of counsel." McMann v. Richardson, 397 U.S. 759 n. 14 (1970) (emphasis added). This Court has explained that in giving meaning to this requirement we must be guided by its purpose – "to ensure a fair trial" – and that therefore the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) In order to prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's

representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms." Strickland, at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland, at 694. see also Wiggins v. Smith, 539 U.S. ___. No 02-311, slip op at 8-10 (June 26, 2003); United States v. Eyman, 313 F.3d 741, 743 (2d Cir. 2002). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

The court of appeals for the Eleventh Circuit has ruled, it is true that the Sixth Amendment right to have the effective assistance of counsel encompasses the right to have counsel untainted by conflicts of interest. United States v. Almedia, 341 F.3d 1318 (11th Cir. 2003); Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980).

The performance and prejudice prongs of Strickland may be addressed in either order, and "[i] f it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice ... that course should be followed." Id. at 679. In evaluating the prejudice suffered by a petitioner as a result of counsel's deficient

performance, the court looks to the "cumulative weight of error" in order to determine whether the prejudice "reach[s] the constitutional threshold." Lindstadt v. Keane, 239 F.3d 191, 202 (2d Cir. 2001)[6]. The court must also keep in mind that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors that one with overwhelming record support." Strickland, 466 U.S. at 696. "The result of a [criminal] proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by preponderance of the evidence to have determined the outcome." Purdy v.

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[6] The Standard of demonstrating actual prejudice of the Strickland test applied by the District Court in the instant case was contrary to clearly established federal law, as established by the United States Supreme Court. See, Strickland v. Washington, 466 U.S. 688; Cuyler v. Sullivan, 446 U.S. 335, which result would be reasonably debatable among jurists of reason.

The petitioner was entitled to relief, where the state court's decision rejecting his effective assistance claim was either contrary to, or involved an unreasonable application of clearly established federal law, as established by the United States Supreme Court, which precedents dictated that the state courts apply the appropriate Strickland and Cuyler test at the time petitioner's ineffective assistance claim was entertained.

Applying the appropriate Strickland / Cuyler test, under the standards set forth in Slack v. McDianiel, 529 U.S. 473, reasonable jurist would find the District Courts rulings that Petitioner had not made a "substantial showing of the denial of a constitutional right.", erroneous.

Zeldes, No 02-7468, 2003 U.S. App. LEXIS 2053, at *18 (2d Cir. Feb. 6 2003) (quoting Strickland, 466 U.S. at 694). Ineffective assistance may be demonstrated where counsel performs competently in some respects but not in others. See Eze v. Senkowski, 321 F.3d 110, 112 (2d Cir. 2003).

The court of appeals for the Forth Circuit has ruled that, "when an actual conflict is present and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice to the defense is presumed and a new trial must be ordered." United States v. Tatum, 943 F.3d 370, 375 (4th Cir. 1991).

As a general matter, strategic choices made by counsel after a thorough investigation of the facts and law are "virtually unchallengeable," though strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. The court of appeals for the Second Circuit has recently gone so far as to imply that all of counsel's significant trial decisions must be justified by a sound strategy – a significant raising of the bar that would appear to require an unrealistic degree of perfection in counsel. See Eze, 2003 U.S. App. LEXIS 2511, at *78 -

- *79 (remanding to district court of factual hearing because it was "unable to assess with confidence whether strategic considerations accounted for ... counsel's decisions").

Although the Strickland test was formulated in the context of an ineffective assistance of trial counsel claim, the same test is used with respect to claims of ineffective appellate counsel. See Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992). Appellate counsel does not have a duty to advance every nonfrivolous argument that could be made, see Jones v. Barnes, 463 U.S. 745, 754 (1983), but a petitioner may establish that appellate counsel was constitutionally ineffective "if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker," Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994). Either a federal or a state law claim that was improperly omitted from an appeal may form the basis for an ineffective assistance of appellate counsel claim, "so long as the failure to raise the state ... claim fell outside the wide range of professionally competent assistance." Id. (quotations omitted).

Moreover, ineffective assistance by counsel may occur under circumstances where the defendant's attorney

operated under a conflict of interest. Washington v. United States, 291 F.Supp.2d 418 (W.D.Va. 2003). Petitioner in this case never waived his right to conflict-free counsel, because there was never a knowing, intelligent, and voluntary waiver of his rights.

Therefore, it has been made clear by this court and the circuit courts that the above procedures should be followed, however, the district court in petitioner's case departed from the usual course of judicial proceedings and failed to observe any of above directions from the higher courts. Therefore, resulting in a decision that was contrary to, and involving an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States.

It has been determined that the most important right that any defendant can have in a criminal trial is the right guaranteed by the Sixth Amendment and that is the right to counsel during all critical stages of the proceeding's against him. This means counsel who is devoted to his client's singular interests and is "conflict free." Wood v. Georgia, 450 U.S. 261, 271 (1981); Holloway v. Arkansas, 435 U.S. 475 (1978); Mickens v. Tayler, 535 U.S. 162 (2002). Petitioner's counsel in this case had an *actual* conflict of interest that adversely impacted upon his

performance. United States v. Fulton, 5 F.3d 605, 609 (2d Cir. 1993); Chandler v. French, 252 F. Supp.2d 219 (M.D.N.C. 2003).

The United States Supreme Court should entertain this petition for a writ of certiorari to resolve this most disturbing issue within this district court. The circumstances herein present an actual conflict of interest between counsel and petitioner that adversely affected the attorney's performance at trial. In such a case, prejudice will automatically be assumed. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). "An actual conflict exist when an attorney engages in wrongful conduct related to the client's trial." United States v. Jones, 900 F.2d 512, 515 (1990). The Second Circuit held, "[A] situation in which the attorney's own interest diverge from those of the client present the same core problems presented in the multiple representation cases; the attorney's fealty to the client is compromised." United States v. Fulton, 5 F.3d 605, 611 (2d Cir. 1993); United States v. Cronic, 446 U.S. 648 (1984).

The District Court based its determination upon the finding that, " ... Petitioner has totally failed to demonstrate that he was prejudiced by his trial counsel's conduct." However, in this case it is clear that Petitioner's

counsel Mr. Goldberg had a "*financial interest*" in having the court not declare a mistrial. Therefore, there is a clear conflict in his representation of Petitioner.

Moreover, it is clearly established by federal law, as established by the United States Supreme Court, that were a claim of ineffective assistance is predicated upon the existence of an actual conflict of interest there is no requirement that actual prejudice be demonstrated, since prejudice in presumed in such circumstances. Strickland v. Washington, 466 U.S. 668; Cuyler v. Sullivan, 446 U.S. 335, 345 – 50.

This Court in Strickland, recognizing the rules it set forth in Cuyler, noting that, "... it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest." This Court noted in recognition of its rule of Cuyler v. Sullivan, nullifying the second prong of the Strickland test, where ineffective assistance claims are based upon actual or potential conflicts of interest, thus, the District Court's application of the prejudice prong of the Strickland test to petitioner's ineffective assistance claim was contrary to

clearly established federal law, as established by the United States Supreme Court.

The District Court identified the correct standard by citing Cuyler v. Sullivan, *supra*, that the petitioner need only establish "(1) An actual conflict of interest that (2) Adversely affected his counsel's performance." See. United States v. Schwarz, 283 F.3d 76, 91 (2d Cir. 2002).

Review of petitioner's ineffective assistance claim is squarely governed by the rule established by the United States Supreme Court in Cuyler, which alleviated the requirement that petitioner demonstrate that he was prejudiced by counsel's conduct, where this Court has stated, "A defendant who shows that a conflict of interest actually affected the adequacy of his representation, he need not demonstrate prejudice in order to obtain relief." Once Petitioner shows that his counsel actively represented conflicting interests, he has established the Constitutional predicate for his claim of ineffective assistance. See Glasser v. United States, 315 U.S. 60, 72-75; Holloway v. Arkansas, 435 U.S. 475, 487-491.

The District Court having opted, pursuant to 28 U.S.C. § 2254 (b) (2), to entertain the merits of petitioner's ineffective assistance claim, the District Court applied the wrong standard in reaching its determination of the merits,

which was contrary to clearly established federal law, as established by the United States Supreme Court, and conflicts with the decisions of other state courts.

Petitioner's case is a clear example of New York State courts departing from the accepted and usual courses of judicial proceedings. The district Court's decision in Petitioner's case is contrary to clearly established federal law, and the states court's decision was not only contrary to clearly established federal law, but was, also an unreasonable application of state law.

CONCLUSION

The petition for write of certiorari should be granted.

Respectfully Submitted,

Gjelosh Rukaj

Gjelosh Joseph Rukaj
Petitioner Pro Se
98A3155
Sing Sing Corr. Facility
354 Hunter Street
Ossining New York 10562

Date: 11-20-04

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

GJELOSH JOSEPH RUKAJ,
Petitioner,

02 CIVIL 3529

-against-

JUDGMENT

BRIAN FISCHER, Superintendent, Sing Sing Correctional Facility,
Respondent.

----------X

A Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. Sec. 2254 having been submitted to the Honorable John S. Martin, United States District Judge, and the Court on January 27, 2003, having rendered its Opinion (88006) and Order, dismissing the petition, as well as the issuance of a certificate of appealability, it is,

ORDERED, ADJUGED AND DECREED: That for the reasons stated in the Court's opinion (88006) and Order dated January 27, 2003, the petition is denied, as is the issuance of a certificate of appealability.

Dated: New York, New York
January 31, 2003

J MICHAEL MC MAHON
Clerk of Court

By: /S
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

GJELOSH JOSEPH RUKAJ,
Petitioner,

02 **CIVIL** 3529

-against-

Order and Opinion

BRIAN FISCHER, Superintendent, Sing Sing Correctional Facility,
Respondent.

----------X

JOHN S. MARTIN, Jr., District Judge:

Gjelosh Joseph Rukaj, who was convicted in the New York State Supreme Court, Westchester County, of Murder in the Second Degree and two counts of Criminal Possession of a Weapon in the Second Degree, brings this action pursuant to 28 U.S.C. § 2254, seeking to vacate his conviction.

Petitioner contends that both his trial and appellate counsel were ineffective, that his due process rights were violated by ex parte communications between the court clerk and the jury concerning the jurors' concerns about their safety that the evidence against him was insufficient to sustain the murder charge and that his due process rights were violated because a critical piece of evidence was missing.

In addition to contesting Petitioner's claims on the merits, the State argues that the Court should not consider certain of Petitioner's claims because he failed to exhaust his

remedies in the state courts. However, 28 U.S.C. § 2254 (b)(2) gives the Court the discretion to deny unexhausted claim on the merits. Given the fact that, as demonstrated below, these claims are utterly lacking in merit, the Court will exercise its discretion and decide the claims on the merits.

Before turning to Petitioner's specific claims it must be noted that Congress has limited the jurisdiction of the Federal courts to provide relief under 22 U.S.C. § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

See, generally Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000). None of the claims asserted by the Petitioner meets this standard.

Petitioner's ineffective assistance of trial counsel claim relates to his counsel's conduct in connection with certain ex parte communication between the court clerk and the jury. Near the end of the trial, the judge advised counsel that when

the court clerk was discussing with the jurors their schedule for the period of deliberations, some of the jurors raised concerns about their safety in leaving the courthouse after the verdict. These concerns were apparently the result of obvious hostility in the courtroom between supporters of the defendant and the family of the victims. Upon being told of these concerns, the judge directed the clerk to tell the jurors that their concerns would be addressed. Some jurors responded that they would like different parking arrangements away from the courthouse. The judge consulted with an officer in charge of security and directed the clerk to tell the jury that he had been in contact with this officer and that they would be protected. Some of the jurors indicated that they wanted to be able to park at a remote location and be transported to and from the courthouse.

It was not until after these communications had taken place that defense counsel was informed of these events. While the court first discussed the issue solely with counsel, Petitioner was ultimately advised of the facts and was present at discussions with the court.

While defense counsel made it clear at these discussions that he did not think that a mistrial was in Petitioner's interest, he strongly felt that the decision had to be left to Petitioner. When Petitioner was questioned by court, he stated that he did not want a mistrial, but that if something

happened between that day, Thursday, and Monday, when the case was to be submitted to the jury, he would want to reconsider the issue. It was agreed that, if there were subsequent problems, Petitioner would not be held to his waiver. On the following Monday, defense counsel stated that Petitioner had reconsidered his position and now wanted a mistrial. The court denied the application, stating that Petitioner had waived his claim and the jurors were present and seemed satisfied with the arrangements for their security. At this point, defense counsel stated that his letter to the court was withdrawn in favor of Petitioner's right to guide his own destiny. Although the court offered to put the fax it had received from defense counsel into the record, this was not done at that time and there is no indication that Petitioner saw the letter at that time. Sometime after the jury's verdict, Petitioner obtained a copy of counsel's fax to the court in which counsel indicated that if a motion for a mistrial was granted, he would want to be relieved because he could not represent someone who acted against his advise.

In addition to opposing this claim on the merits, Respondent claims that the court cannot consider this issue because it was procedurally defaulted in the state court because Petitioner failed to assert it on his direct appeal. Indeed, when Petitioner did raise the claim in a motion pursuant to New York CPLR § 440.10, the state court rejected

the claim on the ground that it was procedurally barred because the facts giving rise to the claim appeared on the trial record and the issue had not bee raised on appeal.

It is well-settled that when a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991); Ylst v. Nunnemaker, 501U.S. 797, 801, 111 S. Ct. 2590, 2593 (1991); Glenn v. Bartlett, 98 F.3d 721, 724 (2d Cir. 1996); Johnson v. Dufrain, No. 99 Civ. 12019, 2001 WL 406261, *5 (S.D.N.Y. Apr 20, 2001).

Petitioner attempts to establish cause for his failure to raise this issue on appeal by arguing that his appellate counsel was ineffective in not raising it on appeal. As will be discussed below, that claim is without merit and thus this claim is procedurally barred.

In any event, there is nothing in the incident relating to the jurors' concerns about their safety that established that defense counsel was ineffective or that the trail judge did anything that violated Petitioner's due process rights. While

Petitioner's counsel criticized the action of the trial judge and defense counsel with regard to this incident, there is no showing that anything that occurred "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 22 U.S.C. § 2254. There was nothing in the communications with the jury that suggested that any of the jurors had prejudged the case or bore any hostility to Petitioner. In these circumstances, the judge would have been acting well within his discretion in denying a mistrial even if Petitioner had not waived his right to seek a mistrial. See United States v. Whitford, 199 F.3d 1324 (2d Cir. 1999); United States v. Parker, 903 F.2d 91, 102 (2d Cir. 1990).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 669, 687, 104 S. Ct. 2052, 2064 (1984). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. Here, Petitioner has totally failed to demonstrate that he was prejudiced by his trial counsel's conduct.

Petitioner's attack on his appellate counsel is equally without merit. Petitioner's appellate counsel filed a seventy-four page brief raising five issues. Petitioner now faults appellant counsel for not asserting ineffective assistance of trial counsel, for not asserting that the indictment should have been dismissed because a material witness was allowed to serve on the grand jury that indicted Petitioner, [1] and for not challenging the trial court's justification charge. In Jones v. Barnes, 463 U.S. 745, 752-53, 103 S. Ct. 3308, 3313 (1983), the Supreme Court rejected the argument that appellate counsel had an obligation to raise every non-frivolous ground for reversal, stating:

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts - - often to as little as 15 minutes - - and when page limits on briefs are widely imposed. See, e.g., Fed. Rules App. Proc. 28 (g); McKinney;s 1992 New York Rules of Court § § 670.17 (g), 670.22.

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[1] Although Petitioner' counsel refers to this individual as a "key witness," this individual an ambulance attendant who helped to treat Petitioner at the scene of the shooting and to transport him to the hospital, was not called as a witness by either side. Thus, it is impossible to perceive how Petitioner was prejudiced by the fact that this person was on the grand jury that indicted him particularly since this individual refrained from participating in the grand jury's deliberations and its vote.

> Even in a court that imposes no time or page limits, however, the new *per se* rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments - - those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of an Appeal, 26 A.B.A.J. 895, 897 (1940) – in a verbal mound made up of strong and weak contentions. See generally, e.g., Godbold, Twenty Pages and Twenty Minutes - - Effective Advocacy on Appeal 30 SW.L.J. 801 (1976).

Here, the issues which the Petitioner faults his counsel for not raiding were of dubious merit and appellate counsel's choice of issues to raise on appeal was well within the range of tactical strategy that is left to the professional judgment of defense counsel, and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

Petitioner's attack on the sufficiency of the evidence does not establish grounds for habeas relief. As the Second Circuit observed in Farrington v. Senkowski, 214 F.3d 237, 240-241 (2d Cir. 2000):

> "[A] state prisoner 'is entitled to habeas corpus relief [only] if it is found that upon the record evidence adduced at the trial no

> rational trier of fact could have found proof of guilt beyond a reasonable doubt.'" Einaugler, 109 F.3d at 839 (quoting Jackson v. Virginia, 433 U.S. 307, 324, 99 S.Ct. 2781. 61 L.Ed.2d 560 (1997)). Appellant bears the burden of rebutting the presumption that all factual determinations made be the state court were correct. See 28 U.S.C. § 2254 (e).

While the evidence established that both Petitioner and one of his victims fired at each other and the Petitioner was severely wounded, the medical evidence established that the unarmed victim whom Petitioner was found guilty of murdering had been shoot three times form the back. This evidence provided ample reason for the jury to reject Petitioner's argument that he was justified in shooting the victim in self-defense.

Petitioner's final claim is that there may have been some impropriety in the handling of the shirt he wore on the night of the shooting and that parts that might have been subjected to forensic test were missing. Petitioner cites not a single authority in support of this argument and fails even to articulate a constitutional argument in support of his claim. As Respondents note, the issue of the condition of the shirt was raised at trial and was not raised on appeal. There is no showing that the state court's handling of this issue "was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States." 22 U.S.C. § 2254.

For the foregoing reasons, the petition for relief pursuant to 28 U.S.C. § 2254 is denied and the action is dismissed. In addition, the Court determine that the petition present no question of substance for appellate review and that Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2); see, Fed. R. App. P. 22 (b). Accordingly, a certificate of appealability will not issue.

SO ORDERED.

DATED: New York, New York
January 27, 2003

/S

John S. Martin, Jr., U.S.D.J.

Copies to:

For Petitioner:

Julia Pamela Heit, Esq.
27 Union Square West
Room 503
New York, New York 10003

For Respondent:

Robin Lamont
Assistant District Attorney
Westchester County
Westchester County Courthouse
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, New York 10601

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : SECOND JUDICAL DEPARTMENT

8546D

C/hu

_____ AD2d_____ Argued – October 12, 1999

FRED T. SANTUCCI, J.P.
WILLIAM C. THOMPSON
THOMAS R. SULLIVAN
WILLIAM D. FRIEDMANN, JJ.

1998 – 06359

The People, etc., respondent, DECISION & ORDER
v Gjelosh Jpseph Rukaj, appellant.
(Ind. No. 96-01401)

Bank, Sheer, Servino & Seymour, White Plains, N.Y. (Anthony Joseph Servino, Jay Goldberg, Brian Linder, and Michael Santangelo of counsel), for appellant.

Jeanine Pirro, District Attorney, White Plains, N.Y. (Richard Longworth Hecht and Maryanne Luciano of Counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Westchester county (Lange, J.), rendered June 3, 1998, convicting him of murder in the second degree and criminal possession of a weapon in the second degree (two counts) upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant's contention that the People did not present legally sufficient evidence to prove his guilt beyond a reasonable doubt is unpreserved for appellate review (*see*, CPL 470.05[2]; *People* v. *Udzinski*, 146 AD2d 245). In any event, the defendant's contention is without merit. Viewing the evidence in the light most favorable to the prosecution (*see, People v. Contes, 60 N.Y.2d 620),* we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, upon the exercise of our factual review power (*see*, CPL 470.15[5]), we are satisfied that the verdict of guilt was not against the weight of the evidence.

The defendant's remaining contentions are without merit.

SANTUCCI, J.P., THOMPSON, SULLIVAN, and FRIEDMANN, JJ., concur.

ENTER

/S
James Edward Pelzer
Clerk

November 15, 1999

PEOPLE v. RUKAJ, GJELOSH JOSEPH

APPENDIX C

S.D.N.Y.
02-CV-3529
Martin, J.

UNITED STATE COURT OF APPEAL
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foely Square, in the City of New York, on the 14th day of January two thousand four.

Present:

Hon. José A. Cabranes,
Hon. Reena Raggi,
Circuit Judges,
Hon. Michael B. Mukasey,
Chief District Judge*

Gjelosh Joseph Rukaj,

Petitioner-Appellant,

v. 03-2144

Brian Fischer,

Respondent - Appelle.

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* The Honorable Michael B. Mukasey, Chief Judge of the United States District Court for the Southern District of New York, sitting by designation.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed because the appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c).

For the Court
Roseann B. Mackechnie, Clerk

By: /S
Lucille Carr

JAN 14, 2004

UNITED STATE COURT OF APPEAL
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foely Square, in the City of New York, on the 24th day of June two thousand four.

Present:

Hon. José A. Cabranes,
Hon. Reena Raggi,
Circuit Judges,
Hon. Michael B. Mukasey,
Chief District Judge*

03-2144

Gjelosh Joseph Rukaj,

Petitioner-Appellant,

v.

Brian Fischer,

Respondent.

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* The Honorable Michael B. Mukasey, Chief Judge of the United States District Court for the Southern District of New York, sitting by designation.

A Motion for Reconsideration having been filed herein by pro se appellant Gjelosh Joseph Rukaj, upon consideration thereof, it is

Ordered that said motion be and it hereby is Denied.

For the Court
Roseann B. Mackechnie, Clerk

By: /S
Arthur M. Heller,
Senior Motion Attorney